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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1239

ESTATE OF ARLESTER L. BURNELL, Ward,
Appellant,

vs.

STATE OF COLORADO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____

ESTATE OF ARLESTER L. BURNELL, Ward,
Appellants,

vs.

STATE OF COLORADO,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

Appellant's appeal from an En Banc Order of the Colorado Supreme Court dated March 4, 1968, reversing the Order of the Probate Court in and for the City and County of Denver holding 1963 Colorado Revised Statutes, Sec. 71-7-1, unconstitutional. The statute provides that the State may recover the cost of care and maintenance from the estate of a criminally insane person com-

mitted to a public institution. Rehearing was denied on April 1, 1968. A copy of the opinion of the Probate Court in and for the City and County of Denver, State of Colorado is attached hereto in the Appendix at page A1. A copy of the opinion of the Supreme Court of the State of Colorado is printed in the Appendix at page A5. Rehearing was denied on April 1, 1968, and Notice of Appeal was filed in the Supreme Court of Colorado on June 13, 1968.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257. The following decisions sustain the jurisdiction of this Court to review the judgment on appeal: *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U.S. 685 (1965); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Charleston Federal Savings and Loan Assn.* v. *Alderson*, 324 U.S. 182 (1945).

STATE LAWS INVOLVED

Statutes involved in this appeal are:

1963 C.R.S., 71-7-1, as amended in 1964:

"Liability.—(1) Whenever any person is admitted, committed, or transferred to any public institution of this state supervised by the department of institutions for the care, support, maintenance, education, or treatment of the mentally ill or mentally deficient, such person, his children, his spouse, and his parents shall be liable for the costs of the care, support, maintenance, and treatment of such person to the extent and in the manner provided in this

article. No other relatives of such person shall be liable to any extent for such costs.

"(2) The provisions of this article shall apply also to those persons received under the provisions of sections 3-11-3, 3-11-5, 39-8-4, and 39-8-6, C.R.S. 1963, as amended, but not by way of exclusion."

1963 C.R.S., 39-8-6 (5) (a):

"Whenever, pursuant to a verdict that the defendant has thus become and then is insane, he is committed by the judge to the state hospital at Pueblo, or such other institution as may be designated hereafter by law, the judge shall order to become a part of the order of commitment a transcript of all evidence presented at such trial, and, if the defendant has been tried on the criminal charge against him, a transcript of all evidence presented at that trial."

QUESTIONS PRESENTED

1. Does 1963 Colorado Revised Statutes, 71-7-1, as amended in 1964, which provides that individuals, including the criminally insane (1963 C.R.S., 39-8-6 (5)), transferred or committed to Colorado State Hospital are liable for their per capita support and maintenance, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

2. Does 1963 C.R.S., 71-7-1, as amended in 1964, when applied to an individual who has been committed to a state institution as criminally insane, violate the due process clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Burnell, in an information filed in the Denver District Court on July 25, 1962, was charged with the crime of murder. A trial on the issue of his sanity was held in the criminal division before a jury, which returned a verdict that Burnell was "legally insane at the time of the commission of the alleged crime and is now legally insane." Thereafter, the District Court ordered him to the State Hospital *to be kept and confined therein in the ward for the criminally insane.*

Because Burnell was receiving pension payments from the Social Security Agency and a Spanish-American War pension, an estate was opened in the Denver Probate Court based on the criminal finding of insanity and letters of conservatorship were issued. Burnell was brought to Denver by order of the criminal court and found by a medical commission to be mentally ill. The estate was established on June 7, 1965, and Burnell was then returned to the Colorado State Hospital. He was at all times (and still is) under the jurisdiction of the criminal division of the Denver District Court in Criminal Action No. 50033.

This suit was commenced on application of the attorney for the Conservatrix of Burnell's estate to set for hearing the claims of the Colorado State Hospital, based on the cost of the care and maintenance of Burnell for the period of April 8, 1963 to April 30, 1966 in the amount of $7,704.94, in the Probate Court for the City and County of Denver. At the hearing it was stipulated and agreed that the question of whether the State of Colorado was entitled to collect was essentially a matter of law, and a written brief was to be submitted by the State of Colo-

rado in lieu of oral argument, and the estate was to have the right to submit a written reply thereto. The State of Colorado submitted a brief on August 4, 1966, and the estate submitted a brief in reply on September 19, 1966. On December 22, 1966, the Denver Probate Court denied the claims of the State of Colorado against the estate in their entirety, holding that the application of the statutory provisions to criminal commitments creates unequal treatment, is repugnant to Constitutional provisions of equal protection and is, therefore, unconstitutional.

The Attorney General thereupon applied for and obtained a Writ of Error to the Colorado Supreme Court. The Colorado Supreme Court, March 4, 1968, reversed the holding of the lower Court with instructions to allow the claims of the Colorado State Hospital, holding that charging the estate of a criminally insane person was not violative of the Fourteenth Amendment to the United States Constitution. The Defendant in Error, Burnell, filed a Petition for Rehearing which was denied April 1, 1968.

THE QUESTIONS ARE SUBSTANTIAL

Jurisdiction should be granted because the Supreme Court of the State of Colorado has decided an important question of federal constitutional law which should be settled by this Court; particularly, since the incarceration and treatment of those individuals who are processed through our criminal courts have certain basic, fundamental, constitutional guarantees which cannot be denied by the states. The issue posed here has arisen in states other than Colorado, and there is wide-spread concern as to the power of various states to discriminate between those confined as criminally insane by requiring them to pay for their maintenance, and those regularly imprisoned

whose maintenance is paid by the state as a governmental function.

I. The Claims of the State Are Based on Statutes Which Deny Burnell Equal Protection of the Laws in Violation of U. S. Const., Amendt. XIV, Sec. 1.

No reasonable basis exists for making assessments against a criminal defendant confined upon a finding of not guilty by reason of insanity but not assessing a defendant confined upon a finding of guilty.

Burnell is confined by an Order of a criminal court which still has jurisdiction over him. Had the criminal court confined him to the state penitentiary rather than to the maximum security ward of the state hospital, no claim would have been made against him. The maximum security ward of the state hospital is used to confine insane prisoners transferred from the state penitentiary and to confine those who are initially found criminally insane upon a jury finding of not guilty by reason of insanity. It is a branch and subdivision of the state penitentiary. It is a place to imprison the mentally ill prisoner.

An accused who is found criminally insane may by executive order be confined in either the state hospital or the penitentiary. *Pigg* v. *Patterson,* 370 F.2d 101 (C.A. 10th Cir. 1966). By a combination of executive orders, it follows, one criminally insane may be charged the full per capita cost of his care and maintenance whereas another, at the penitentiary, is charged nothing. This is an invidious distinction which, if anything, metes out more punishment to one less dangerous to society (Burnell) than to another (Pigg). See *Rinaldi* v. *Yeager, Warden,* 384 U.S. 305 (1966), where this Court held a New Jersey statute violative of equal protection which assessed costs against a prisoner for a trial transcript.

A landmark decision in the law of the insane and the poor is *Dep't of Mental Hygiene* v. *Kirchner* (388 P.2d 720; 36 Cal. Reptr. 488; 85 S.Ct. 871; 400 P.2d 321, 43 Cal. Reptr. 329). The central reasoning of the court in the *Kirchner* case is expressed in three summary passages: First, the enactment and administration of laws providing for treatment of persons in appropriate state institutions is a proper state function. Being so, the costs should be borne by the state. (388 P.2d 722) Second, "A statute obviously violates the equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such classification [citing cases]. . . . Such a concept for the state's taking of a free man's property manifestly denies him equal protection of the law." (388 P.2d at 724) Third, the cost of a proper state function conducted for the public benefit "cannot be arbitrarily charged to one class in the society." (388 P.2d at 722) Imposing liability on Burnell for the cost of maintaining the hospital does arbitrarily charge it to one class in society and violates the basic guarantee of the equal protection of the law. Prisoners sent to the penitentiary are not charged, nor are their estates or relatives charged the per capita cost of maintaining the penitentiary. No demand is made on penitentiary prisoners, their estates or their relatives, however, for the per capita cost of their care and maintenance.

The *Kirchner* case dealing with the poor, their welfare problems, and their mental problems, considering a developing sense of social responsibility answered the verdict of the quiescent years by saying that the standards for charging for a public benefit must be measured by equal protection, and proceeded to do so by stating that no case was to be found "which squarely faced, considered, discussed, and sustained such statutes in the light

of the basic question as to equal protection of the law." 36 Cal. Reptr. at 491, 388 P.2d at 723.

A statute infringes the constitutional guaranty of equal protection if it singles out for discriminatory legislation particular individuals not forming an appropriate class and imposes on them burdens or obligations or subjects them to rules from which others are exempt. Under the guise of the exercise of the police power, it is not competent either for the legislature or for a municipality to impose unequal burdens upon individual citizens. *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U.S. 79.

While it is true that the present question was not before the court in *Kirchner* and was, therefore, expressly withheld from decision, *Kirchner*, nevertheless, has applicability to the case at bar. *Kirchner* held that the charge statute was a "species of taxation" arbitrarily charged to one particular class of persons, that no rational basis supported the classification, and that the statute, therefore, denied equal protection of the law. The equal protection inquiry here, then, is whether the class of criminally insane persons confined in the state hospital is a constitutionally valid class as distinguished from criminally insane persons confined in the penitentiary. The trial court below held that it is not.

If Burnell as an incompetent is not legally responsible to the state for homicide, a most serious offense against the state, is there any rational basis on which the state can say that he is legally responsible for an arbitrarily determined cost of his maintenance at an institution where the state forces him to reside? If he is not responsible for the act which resulted in his commitment, he is there for no legal fault of his own, and liability cannot be predi-

cated on responsibility, but only on private benefit, a theory inapplicable to Burnell, who is obviously confined for the public's protection against repetition of his unfortunate act.

That Burnell is in the state hospital for public benefit and not private benefit is emphasized in the following statute:

> "The test for determination of a defendant's sanity for release from commitment, or his eligibility for conditional release shall be: that the defendant has no abnormal mental condition which would be likely to cause him to be dangerous either to himself or to others or to the community in the reasonably foreseeable future." C.R.S. 1963, 39-8-4 (4).

II. The State's Claims Are Based upon Statutes Which Violate the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution.

1. When Burnell was first committed to the state hospital maximum security ward in April 1963, the state commenced billing at $95.00 per month; this was subsequently raised to $258.00 per month in January 1964, and he is currently being charged at the rate of $540.00 per month. Burnell was given no notice of these assessments and no notice or hearings were granted at the initial assessment or any successive assessments. The deprivation of a right to a hearing prior to the imposition of an assessment or a species of tax deprives persons of property without due process of law. The right to notice and hearing is not innocuous or unsubstantial. It is entirely too fundamental to require discussion. Burnell has not only been imprisoned for his unfortunate act, but made to pay for his imprisonment, having to pay amounts to a fine not imposed as the result of any decision of the criminal court

which has jurisdiction over him. Is this in conformity with our hallowed traditions of due process of law? The answer, it is submitted, must be negative.

2. *The statutes substantially impair one accused of crime of his right to plead "not guilty by reason of insanity."*

Should an individual pleading "not guilty by reason of insanity" be required to turn his estate over to the state hospital? "A statute providing that insanity shall be no defense to a criminal charge would be unconstitutional." *State* v. *Strasburg,* 60 Wash. 106, 110 Pac. 1020. Is this right to plead "not guilty by reason of insanity" only to be a plea of the persons that can afford to pay the charges at the state hospital? The hospital has determined the per capita cost of maintaining a patient at the hospital is $540.00 per month. Who is to make this determination of whether the criminally insane defendant can afford to enter a plea of "not guilty by reason of insanity," the criminally insane defendant, his relatives, his attorney, or the Judge? If the relatives make this decision, they are required under the statutes to pay for his maintenance. If the lawyer or Judge makes this determination for the client, they are possibly making a decision impoverishing the insane defendant.

This Court has held there can be no equal justice where the kind of trial a man receives depends on the amount of money he has. The United States Supreme Court has declared that the indigent are entitled to free counsel; does it follow that the poor and insane shall have "separate" and "unequal" choice in the matter of a plea to a criminal information? *Hardy* v. *U. S.,* 374 U.S. 277; *Griffin* v. *Williams,* 351 U.S. 12; *Gideon* v. *Wainright,* 372 U.S. 335.

CONCLUSION

The State Supreme Court of Colorado justifies its holding that the criminally insane may be reasonably distinguished from other prisoners on the ground that because of their illness they cannot be productive and that it would be impractical to attempt to recover the costs of their care by requiring them to earn it. It gives the further reason that they are a greater burden upon the state because of illness and that recovery of such expense from them is justified. Such distinctions are indeed a weak basis to justify unequal treatment.

The bases of the trial court's finding of unequal treatment before the law are more convincing:

> "This court is unable to indulge in the niceties which would distinguish between persons sent to the penitentiary upon conviction of a crime and those charged with a crime, but whose trial thereon for the substantive offense is barred by the finding of insanity. . . . In each case the defendant is in a criminal court because of the filing of criminal charges; each is alleged to have offended the state. As to the former, his confinement is at state expense, but the latter whose route through criminal processes is identical in the matter of the filing of an information, arrest, arraignment and judgment, is asked to pay his own way. In this case at bar, the ward has been billed by the state hospital for the period of his confinement, even though this confinement resulted from an order of a criminal court.
>
> "The application of these statutory provisions to criminal commitments creates unequal treatment, is

repugnant to the provisions concerning equal protection and is, therefore, unconstitutional."

Jurisdiction should be noted.

Respectfully submitted,

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IN THE PROBATE COURT IN AND FOR THE
CITY AND COUNTY OF DENVER AND
STATE OF COLORADO

No. P-31270

IN THE MATTER OF THE ESTATE OF
ARLESTER L. BURNELL,
Ward.

Order of the Court

The ward was brought before a Justice of the Peace in the City and County of Denver and charged with murder. He was then bound over to the District Court and ordered to stand trial. Thereafter, he was examined by psychiatrists, found not guilty by reason of insanity and committed to the Colorado State Hospital. He was placed in the maximum security division of the hospital, a section used solely for criminals.

Colorado Revised Statutes, 71-7-1, et seq., 1963, as amended (SL 1964, Ch. 59), provide that individuals (including the criminally insane, Ch. 39-8-6, C.R.S. 1963) transferred or committed to the Colorado State Hospital are liable for the per capita share of their support and maintenance. Pursuant to these statutes the hospital has been billing the ward's estate. Claims for support now total in excess of $8,000 through May 1, 1966, while the ward's estate as of June 1, 1966, was $8,071.03. The conservatrix now asks this court to consider the validity of the hospital's claims and of the statutes on which they are based.

The tradition that the sovereign can take and manage the estates of mental incompetents is deeply rooted

in the common law. *State* v. *Ikey's Estate*, 84 Vt. 363, 79 A. 850, 1911. There is, however, a distinction between the civil commitments of ordinary mental incompetents and commitments which occur as a result of an insanity plea in a criminal trial. The Supreme Court of Illinois declared:

> "We cannot agree with plaintiffs reasoning that there is no valid basis for making a distinction between persons who are imprisoned on account of some criminal charge or offense, and who, if they were in physical and mental health would be in jails and penitentiaries. We think there is a clear basis for distinction. Inmates against whom there are no criminal charges, or who have been guilty of no criminal offenses, are in the hospital solely for treatment. Those who are charged with crime, or who have been convicted of a crime, would ordinarily be in the jail or penitentiary, but on account of the fact that there are no facilities there for treating them for their physical and mental ills they are transferred to the hospitals. Moreover the public is vitally and directly interested in those who are in custody. They are in custody initially for the protection of the public, when convicted or accused of crime. They do not cease to be of intimate consideration to the public merely because they are, or become, insane, nor do they cease to be in custody for the same reason. Those patients in the state hospitals for the purpose of treatment alone are of direct and vital interest only to their relatives and friends." *Kough* v. *Hoehler*, 413 Ill. 409, 109 N.E.2d 177, 180-181 (1953).

The finding by a jury, such as in the case at bar, is not the same as an adjudication pursuant to the procedures set forth in Chapter 71, and it has been so held by our Supreme Court in *Davis* v. *Colorado Kenworth Corporation*, 156 Colo. 98, 396 P.2d 958, 1964.

This court is unable to indulge in the niceties which would distinguish between persons sent to the penitentiary upon conviction of a crime and those charged with a crime, but whose trial thereon for the substantive offense is barred by the finding of insanity. One superficial distinction, that the criminally insane are not usually confined in the state penitentiary with ordinary prisoners, is due to a lack of proper facilities for treating their mental illnesses. The state does have the power, however, to imprison the criminally insane in the penitentiary if it chooses to do so. *Pigg* v. *Patterson,* U.S. Ct. of App., 10th Cir., No. 8869, Nov. Term, 1966. In each case the defendant is in a criminal court because of the filing of criminal charges; each is alleged to have offended the state. As to the former, his confinement is at state expense, but the latter whose route through criminal processes is identical in the matter of the filing of an information, arrest, arraignment and judgment, is asked to pay his own way. In this case at bar, the ward has been billed by the state hospital for the period of his confinement, even though this confinement resulted from an order of a criminal court.

The application of these statutory provisions to criminal commitments creates unequal treatment, is repugnant to the provisions concerning equal protection and is, therefore, unconstitutional.

> "A statute obviously violates the equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such classification." *Department of Mental Hygiene* v. *Evelyn Kirchner,* 388 P.2d 720, 36 Calif. Reptr. 488 (en banc, January 30, 1964). Vacated, 380 U.S. 194, 13 L.Ed.2d 753 (1965).

The claims are denied and judgment entered accordingly.

Dated at Denver, Colorado, this 22nd day of December, A.D. 1966.

By The Court:

/s/ David Brofman

Judge of the Probate Court

No. 22925

STATE OF COLORADO, COLORADO STATE HOSPITAL, CHARLES E. MEREDITH, SUPERINTENDENT,
Plaintiffs in Error,

vs.

ESTATE OF ARLESTER BURNELL, WARD,
Defendant in Error.

ERROR TO THE PROBATE COURT OF THE CITY AND COUNTY OF DENVER
HON. DAVID BROFMAN, JUDGE
EN BANC

Judgment Reversed and Cause Remanded

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MR. JUSTICE DAY delivered the opinion of the Court.

Arlester L. Burnell, to whom we will refer as Burnell, was charged by information in the district court with the crime of murder. Upon his plea of not guilty by reason of insanity, Burnell was granted a separate jury trial on the issue of his sanity. The jury returned a verdict

finding Burnell "legally insane at the time of the commission of the alleged crime and is now legally insane." Pursuant to the judgment entered on the jury verdict, Burnell was committed to the Colorado State Hospital.

In subsequent proceedings in the probate court of the City and County of Denver, Burnell was civilly adjudicated a mental incompetent. An estate was opened in which Burnell's daughter was appointed conservatrix to enable her to collect Burnell's veteran's pension. Considerable money had accumulated in the estate when in April 1966, the Colorado State Hospital filed claim for the costs of care and maintenance of Burnell which had accrued since his admission to the hospital on April 8, 1963. Authority for reimbursement of these costs from the Burnell estate is provided for in C.R.S. 1963, 71-1-16.

The probate court denied the claim, holding that the particular statute is unconstitutional as applied to one adjudicated criminally insane. The court's judgment of dismissal is challenged in this writ of error.

The applicable statute clearly imposes liability on the *estate* of a criminally insane person who is committed or transferred to a public institution operated by the State of Colorado for care and maintenance. The statute also imposes similar liability for costs of care, treatment and maintenance of the mentally ill or mentally deficient persons who are civilly committed to such institutions.

In holding the statute unconstitutional as applying to a criminally insane person, the probate court held it violative of the equal protection guarantee of the Fourteenth Amendment to the United States Constitution. The court took the position that there was an insufficient distinction between that class of persons found guilty of crime

and sent to the state penitentiary and those in the class found not guilty of crime by reason of insanity and sent to the Colorado State Hospital so as to constitutionally charge the latter for their care and maintenance while not charging the former. The court found unequal protection on the assumption that those found guilty of crime and those found not guilty by reason of insanity are of the same class and that they are accorded different and unequal treatment under the law.

Assuming that such persons are of the same and not of a distinctive class, it is to be noted that C.R.S. 1963, 105-4-17, provides:

> "Every able-bodied convict shall be put to, and kept at, the work most suitable to his capacity, and most advantageous to the people of the state of Colorado, and which may least conflict with the free labor of the said state, during his confinement. The earnings of such convict, *after deducting sufficient amount thereof to pay and satisfy the cost of maintenance and retention,* shall be given to the family of such convict, or dependents, if there be any, and if there be none, the same accumulated shall be paid to such convict upon discharge from the penitentiary." (Emphasis added.)

Similar provisions also exist concerning the care and maintenance of delinquents in other institutions under the Department of Institutions. See, e.g., C.R.S. 1963, 105-7-7, relating to the earnings of male prisoners in county jails.

Thus, it may be seen from the statutes that the costs of maintaining and caring for those in the various institutions of the state of Colorado, be they penal or medical, are recoverable. Only the manner of recovering the costs differ. In *Landwehr* v. *Regents of the University of Colorado*, 156 Colo. 1, 396 P.2d 451, we quoted with approval

the following language from *Driverless Car Co.* v. *Armstrong*, 91 Colo. 334, 14 P.2d 1098:

> "* * * to constitute class legislation within the constitutional prohibition, the classification must be unreasonable. The question of classification is primarily for the legislature. Courts will not interfere with the legislative classification unless it appears that there is 'no fair reason for the law that would not equally require its extension to the accepted class.' * * *"

In making the distinction between the method of recovering the costs of confining and maintaining convicted criminals and of caring for and treating the criminally insane, we hold that such difference is not unreasonable. The legislature has given recognition to the fact that the criminally insane persons are ill and that many usually cannot be put to profitable work. It would therefore be impractical to attempt to recover the costs of their care by requiring them to earn it, although there are undoubtedly some instances in which they do earn their care and maintenance. Also hospital care and treatment is generally more involved, more expensive and oftentimes of considerably longer duration than commitment in other institutions. We can see no constitutional inequality in requiring those receiving more expensive care to be liable for additional costs through assets which they may have accumulated.

Additionally, we believe the probate court erred in classifying the criminally insane with those found guilty of crim and incarcerated in the state penitentiary. This classification cannot be found in any legislative enactment. The legislative classification grouped the criminally insane with all other persons who are adjudicated mentally ill or mentally deficient. With such a classifi-

cation the statute then provides that regardless of how the person has been committed, all persons being treated in the same institution are charged for the costs thereof with recovery from the estate, if any, being the same in all instances. We see nothing unreasonable or unequal in this classification.

The judgment of the probate court is reversed and the cause remanded with instructions to allow the claims of the Colorado State Hospital and to enter judgment therefor in the estate in the amount per stipulation of the parties already of record in the trial court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 239

ESTATE OF ARLESTER L. BURNELL, Ward,
Appellant,

VS.

STATE OF COLORADO
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS APPEAL

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IN THE

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NO. 239

ESTATE OF ARLESTER L. BURNELL, Ward,
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS APPEAL

OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado is reported in 439 P2d 38 (1968) and is appended to the Appellant's Jurisdictional Statement. The reported version of the Colorado Supreme Court's opinion was amended to correct an erroneous reference to CRS 1963 71-1-16 in the original version by adding to said statute, "as amended in 1965 Perm. Supp. CRS 71-7-1 et seq."

STATUTES INVOLVED

1. The correct citation to the statute involved is C.R.S. 1963, 71-7-1 (1965 Perm. Supp.)

STATEMENT OF THE CASE

Appellee's claims are in part based upon C.R.S. 1963 71-1-16 repealed by the 1964 Session Laws of Colorado, Chapter 59, Section 7, Page 64. That portion of appellee's claim accruing subsequent to the repeal of C.R.S. 1963, 71-1-16 is based upon C.R.S. 1963, 71-7-1 (1965 Perm. Supp.).

ARGUMENT

Appellee, pursuant to Rule 16 (1) (B), Rules of the United States Supreme Court, moves the Court to dismiss the Appeal herein on the following ground:

The Judgment of the Colorado Supreme Court Rests on an Adequate Non-federal Basis.

A. Jurisdictional Doctrines of this Court Applicable to this Case.

It has long been the policy of this Court to refuse jurisdiction of cases involving a judgment of a state court which, in addition to being founded on a federal ground, is supported by an adequate non-federal ground independent of the federal one. *Jankovich vs. Indiana Toll Road Com.*, 85 Sup. Ct 493 (1965). Moreover, this result is not changed by the fact that the "adequate non-federal ground" depriving this Court of jurisdiction to review is a state constitutional provision similar in nature and effect to a provision contained in the Federal Constitution. *Jankovich vs. Indiana Toll Road Com.*, supra. As a corrollary to the rule stated above, the record of a case under appeal must affirmatively reflect with "requisite certainty" that the decision of the Federal question was necessary for determination of the case. *Buck vs. California* 72 Sup. Ct 502. (1951) The application of the above jurisdictional doctrines relevant to the case at Bar is demonstrated by the following:

"The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the equivalent provisions of the California Constitution, or both. While we might speculate from the choice of words used in the opinion, and the authorities cited by the Court, which provision was the basis for the judgment of the State Court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent non-federal ground. This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented . . ." *Department of Mental Health* vs. Kirchner, 85 Sup. CT. 873 (1965)

and

"An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that Court relied on the State Constitution alone, the Federal Constitution alone, or both, and we would have jurisdiction to review only if the federal ground would have been the sole basis for the decision or the State Constitution was interpreted under what the State Court deemed the compulsion of the Federal Constitution. *Kirchner,* supra at pg. 874.

B. The Judgment of the Colorado Supreme Court was Based upon Section 25, Article 2 of the Constitution of the State of Colorado.

Section 25, Article 2, of the Constitution of Colorado is as follows:

"Section 25. Due Process of Law. No person shall be

deprived of life, liberty nor property without due process of law."

The Fourteenth Amendment, Section 1, of the United States Constitution provides in part:

"Nor shall any State deprive any person of life, liberty, nor property without due process of law."

The question of whether due process requirements of the above provisions were violated by CRS 1963 71-7-1 (1965 Perm Supp) was specifically raised in Appellant's brief filed in the Colorado Supreme Court (designated, "Reply on Application for Supersedeas", in Appellant's Amended notice and Designation of Record on Appeal to the United States Supreme Court), under Section "C" thereof captioned:

"The States claims are based upon Statutes which violate the due process clauses of the United States Constitution Amendt. XIV, Sec. 1 and *Colo. Const. Art. II, Sec. 25.*" (emphasis ours)

Appellant's due process argument was presented to the Colorado Supreme Court as follows:

"If prisoners in the penitentiary are compensated for their labor, as alleged in the brief of Appellant, the case for Burnell is a fortiori when it is considered that no compensation whatever is allowed him for his labor in behalf of the State performing menial but useful services at the hospital. Is this in conformity with our hallowed traditions of due process of law? The answer, it is submitted, must be negative." *Appellant's reply on supersedeas,* Section C, pg. 9

Hence, Appellant's due process opposition to C.R.S. 1963 71-7-1, (1965 Perm. Supp.) as expressed in their

brief to the Colorado Supreme Court, imposed upon that Court the task of deciding whether the inclusion of the criminally insane within the provisions of said Statute and the exclusion of convicted criminals therefrom constituted discrimination prohibited by Colorado and Federal Due Process. Prerequisite to proper resolution of this issue obviously required grouping convicts and the criminally insane into the same class. Accordingly, the Colorado Supreme Court replied to the Due Process contentions raised by Appellants in the following manner;

> "Assuming that such persons are not of a distinctive class, it is to be noted that *CRS 1963, 105-4-17,* provides 'every able bodied convict shall be put to and kept at the work most suitable to his capacity, and most advantageous to the people of the State of Colorado, and which may least conflict with the free labor of the said State, during his confinement. The earnings of said convict, after deducting sufficient amount thereof to pay and satisfy the cost of maintenance and retention, shall be given to the family of such convict or dependents, if there be any, and if there be none, the same accumulated shall be paid to such convict, upon discharge from the penitentiary,' similar provisions also exist concerning the care and maintenance of delinquents and other institutions under the Department of Institutions. . . . Thus, it may be seen from the Statutes that the cost of maintaining and caring for those in the various institutions of the State of Colorado, be they penal or medical are recoverable. Only the manner in recovering the costs differ. . . . In making the distinction between the method of recovering the costs of confining and maintaining convicted criminals and of caring for and treating the criminally insane, we hold that such difference is not

> unreasonable. . . . We can see no constitutional inequality in requiring those receiving more expensive care to be liable for additional costs through assets which they may have accumulated." *State of Colorado vs. Burnell,* supra at pg. 40

The relevancy of the above remarks to appellant's due process argument raised in their Brief ("Reply on Application for Supersedeas") under Section C thereof logically indicates that at least the Colorado Supreme Court considered due process in light of both Colorado and Federal Constitutional requirements. Of significance in this regard, is the Colorado Court's omission to cite any Federal authority in support of its due process position. Equally significant is the Court's complete and patent reliance upon C.R.S. 1963, 105-4-171 to find C.R.S. 1963, 71-7-1 (1965 Perm. Supp.) constitutionally valid. No basis therefore, exists to conclude that the connecting due process link between two Colorado Statutes was determined by the Colorado Supreme Court solely on the Fourteenth Amendment of the United States Constitution. And certainly, even disregarding the improbability attaching to such a conclusion, this Court cannot so find with "reasonable certainty" or indeed any certainty whatsoever. Rather, the Colorado Supreme Court's reliance upon Colorado's Constitution is indicated when it is considered that the due process issue as raised by Appellant specifically required that Court to apply Sec. 25, Article 2 of Colorado's Constitution. Moreover, research discloses no Federal decision pertinent to the facts of the instant case and hence, there were no federal constitutional guidelines to influence the Colorado Supreme Court. Appellee, therefore respectfully submits that the decision of the Colorado Supreme Court must necessarily rest upon Sec. 25, Article 2, Constitution of Colorado and Colorado case law thereunder.

C. The Determination of the Federal Equal Protection Question by the Colorado Supreme Court was not Necessary for Determination of the Controversy.

Appellee submits that analysis of the entire record of the instant case conclusively indicates the Colorado Supreme Court's due consideration and ensuing determination that:

> C.R.S., 1963 71-7-1 (1965 Perm. Supp.) did not violate the Equal Protection of Laws Clause of the Fourteenth Amendment of the United States Constitution. C.R.S. 1963, 71-7-1 (1965 Perm. Supp.) did not violate Colorado's due process provision set forth in Colorado. Const., Art. II, Sec. 25.

The conclusions reached by the Colorado Supreme Court regarding the Federal Equal Protection question were based directly upon issues raised by Appellant's brief, filed with the Colorado Supreme Court entitled "Brief of Defendant in Error" and designated as "Reply on Supersedeas." Section B of Appellant's aforesaid brief presented the Equal protection issue as follows:

> "Kirchner held that the charge Statute was a 'species of Taxation' arbitrarily charged to one particular class of persons, that no rational basis supported the classification, and that the Statute therefore denied Equal Protection of the Law. *The Equal Protection Inquiry here, then, is whether the class of criminally insane persons confined in the State Hospital is a constitutionally valid class as distinguished from criminally insane persons confined in the penitentiary. The Court below held that it did not." Appellant's Reply on Supersedeas.* Section B, pg. 5 (emphasis ours)

Thus, Appellant in its role as proponent of the Federal Equal Protection question directed the Colorado Supreme

Court's consideration to whether a valid distinction existed between the criminally insane and Court sentenced criminals. In this connection it is to be noted that Appellant's Equal Protection assertion against a valid distinction was adopted by the Denver Probate Court to find C.R.S. 1963, 71-7-1 (1965 Perm. Supp.) unconstitutional. Responding to the foregoing Court holding and Appellant's support thereof, the Colorado Supreme Court stated its position with regard to the Equal Protection question as follows:

> "*Additionally*, we believe the Probate Court erred in classifying the criminally insane with those found guilty of crimes and incarcerated in the State Penitentiary. This classification cannot be found in any legislative enactment. The legislative classification grouped the criminally insane with all persons who are adjudicated mentally ill or mentally deficient. With such classification that Statute then provides that regardless of how the person has been committed, all persons being treated in the same institution are charged for the cost thereof with recovery from the estate if any, being the same in all instances. We see nothing unreasonable or unequal in this classification." (emphasis ours) *State of Colorado vs. Burnell*, 439, P2d 40 (1968)

Clearly the format of this holding conforms directly to the issue developed by Appellant's Equal Protection "inquiry". Consequently, it is possible to separately consider the Colorado Supreme Court's Equal Protection determination and attention is therefore directed to the word "additionally" used by the Colorado Court to introduce that determination. Thus, the word "additional" is defined as follows:

- "Added, coming by way of addition. *Extra*, supplementary. —Additionally (adv.)" (emphasis ours)

Webster's New Collegiate Dictionary, (Merriam Webster Edition 1954, pg. 10)

"Extra", in turn, is defined:

"Beyond or greater than what is due, usual, or necessary . . ." *Webster's New Collegiate Dictionary,* supra, pg. 293

It can now be seen that the Colorado Supreme Court's determination of the Federal Equal Protection question was neither the "sole basis for the decision" nor necessary for disposition of the controversy. Therefore, jurisdiction of this honorable Court cannot be extended to the Cause herein by virtue of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

On the basis of the foregoing discussion, Appellee maintains that Section 25, Article 2, of the Colorado Constitution provides the due process basis for the decision of the Colorado Supreme Court. Appellee further maintains that the Colorado Supreme Court's determination of the Federal Equal Protection question was not necessary for disposition of the controversy. Therefore, it is urged that the Appeal herein be dismissed in order to finally terminate this Case and absolve this Court's obligation to decide a substantial constitutional question.

Dated at Denver, Colorado this 8th day of August A.D., 1968.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 239

ESTATE OF ARLESTER L. BURNELL, Ward,
Appellant,

vs.

STATE OF COLORADO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF COLORADO

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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IN THE

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OCTOBER TERM, 1968

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OPPOSING MOTION TO DISMISS APPEAL

ARGUMENT

1. The Record Does Not Support Colorado's Argument That the Decision Below Rests on a Non-Federal Basis, for the Supreme Court of Colorado Explicitly Based Its Findings Solely on the Federal Constitutional Question.

The Probate Court summed up the basis of its decision by saying:

> "The application of these statutory provisions to criminal commitments creates unequal treatment, is repugnant to the provisions concerning equal protection and is, therefore, unconstitutional.
>
> 'A statute obviously violates the equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such classification.' *Department of Mental Hygiene* v. *Evelyn Kirchner*, 388 P.2d 720, 36 Calif. Reptr. 488 (en banc, January 30, 1964). Vacated, 380 U.S. 194, 13 L.Ed.2d 753 (1965)." [Jurisdictional Statement, p. A3]

The Colorado Supreme Court considered the constitutionality of the statute in question solely as it related to the prohibition in the Fourteenth Amendment against unequal treatment. In analyzing the case before it from the Denver Probate Court, the Court brought the Federal question sharply into focus by the following language:

> "In holding the statute unconstitutional as applying to a criminally insane person, the Probate Court held it violative of the equal protection guarantee of the Fourteenth Amendment to the United States Constitution. . . . The court found unequal protection on the assumption that those found guilty of crime and those found not guilty by reason of insanity are of the same class and that they are accorded different and unequal treatment under the law." [Jurisdictional Statement, p. A6]

The Colorado Supreme Court made doubly clear that it was discussing the principle of equal protection by citing *Landwehr* v. *Regents of the University of Colorado*, 156 Colo. 1, 396 P.2d 451, where the Court said that the principal arguments of *Landwehr* were based on the equal protection, due process, and the privileges and immunity clauses of the Constitution of the United States, and proceeded to decide the Federal questions.

The Colorado Supreme Court also quoted language from *Driverless Car Co.* v. *Armstrong*, 91 Colo. 334, 14 P.2d 1098 [Jurisdictional Statement, p. A8]. The first part of the paragraph quoted was omitted by the Court but did set forth the basis for the conclusions in the *Driverless Car* case. The omitted preceding sentences are as follows:

> "It is urged that the provisions in question offend against the provision of the Fourteenth Amendment to the Constitution of the United States forbidding a state to make or enforce any law denying any person the equal protection of the laws. The argument in support of this objection challenges the classification adopted by the legislature."

Denial of equal protection has been the thrust of the argument of the appellant throughout the presentation of his case beginning with the Probate Court. Under the admitted facts, the extent of the invasion of appellant's rights is so great, so arbitrary, so oppressive and unreasonable, that it goes to the denial of equal protection and due process under the Federal Constitution.

The Colorado Court was clearly dealing with a federal question when it held that there was no *inequality* of treatment since Colorado statutes require that convicts at the State Penitentiary pay and satisfy the cost of their maintenance and retention. [This argument is wholly without merit, having been presented to the Colorado Supreme Court on Motion for Rehearing. Inquiry has established that as a matter of fact and policy the State Penitentiary has never charged a prisoner for his maintenance and care.]

2. The Injection of the Argument That Article II, Section 25, of the Constitution of the State of Colorado Was the Non-Federal Basis of the Decision Is Spurious.

Article II, Section 25, is the general due process clause of the Colorado Constitution which simply provides:

> "No person shall be deprived of life, liberty nor property without due process of law."

Section 1 of the Fourteenth Amendment to the United States Constitution is similarly worded. The Colorado Constitution, however, has no clause which parallels the equal protection clause of the Fourteenth Amendment.

Counsel for the State argue that since the appellant cited the due process clause in the State Constitution of Colorado in his arguments before the State Supreme Court, that necessarily it must be assumed that the Colorado Supreme Court was basing its decision upon the State Constitution. There is utterly no logic in counsel's argument that this "imposed upon the Court the task of deciding whether the inclusion of the criminally insane within the provisions of said statute and the exclusion of convicted criminals therefrom constituted discrimination prohibited by Colorado and Federal due process." It is obvious from reading the Court's decision that it did not deem the issue to be one of general due process, but rather one of equal protection. It is significant that the Court did not once mention the Colorado Constitution nor did it ever use the phrase "due process." On the contrary, the Court consistently discussed the problem of equal protection.

It is apparent from the arguments presented in the Motion to Dismiss that counsel is attempting to manufacture a non-federal basis for the decision below by attempting to equate general due process with equal protection. They

were compelled to do this since the Colorado Constitution has no provision which is analogous to the equal protection clause. If this were true and the Court below had referred to such a clause in the Colorado Constitution, then we would have a situation comparable to that in *Department of Mental Hygiene of California, Petitioner,* v. *Evelyn Kirchner, Administratrix,* 380 U.S. 194, 13 L.Ed.2d 753, 85 S.Ct. 871. In that case California did have a provision in its Constitution that "All laws of a general nature shall have a uniform operation." In that case the Supreme Court of California mentioned the equal protection clauses of both the State and Federal Constitutions in its opinion, and this Court held that it was unable to ascertain whether the lower Court's decision rested on the Federal or the State provisions, and accordingly remanded the case for a determination. The case at bar is easily distinguishable from *Kirchner* in that the Colorado Supreme Court mentioned no State Constitutional provision whatsoever and, further, its decision could not have rested upon a State ground of equal protection since the Constitution of Colorado has no equal protection clause.

The situation here is not comparable to that in *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493, cited by counsel for Colorado. In the Jankovich case, there was a co-existence of Federal and State due process grounds, and the State Court opinion was based explicitly upon both State and Federal Constitutions, this Court holding that the non-federal basis of the decision was adequate. In this case there was no explicitly stated co-existence of Federal and State grounds. On the contrary the Colorado Supreme Court ruled as it did because it was interpreting the equal protection clause

of the Fourteenth Amendment. *Minnesota* v. *National Tea Co.*, 309 U.S. 544, 84 L.Ed. 922; *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 95 L.Ed. 3, 71 S.Ct. 1; *State Tax Commission* v. *Van Cott*, 306 U.S. 511, 83 L.Ed. 950, 59 S.Ct. 605; *Perkins* v. *Benguet Mining Co.*, 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413.

3. The Question Decided by the Court Below Was Not Only Federal in Nature but Is Admittedly a Substantial One.

The Motion to Dismiss filed by the State of Colorado does not dispute the fact that the issues presented in this appeal are of widespread importance. In effect Colorado has conceded the importance of the question.

Although counsel for the appellant do not have information relating to all of the states, we are aware that many of the 42 states having legislation permitting the collection from the estates of incompetent persons for maintenance (as referred to in *Kirchner* in the footnote in the official reports on page 201) do have statutory powers to so collect from the estates of those committed as criminally insane. In *Kirchner* 8 states filed amicus briefs in this Court.

CONCLUSION

It is clear from the record that the decision in the Colorado Supreme Court rested solely upon the equal protection provisions of the Fourteenth Amendment and that the argument of counsel for Colorado that there was present a non-federal issue based upon the general due process clause of the Colorado Constitution is utterly without foundation. The question presented is properly before this

Court and is of such substantial nature that it warrants a finding of jurisdiction.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 239

ESTATE OF ARLESTER L. BURNELL, Ward,
Appellant,

vs.

STATE OF COLORADO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR REHEARING

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IN THE

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No. 239

ESTATE OF ARLESTER L. BURNELL, Ward,
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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR REHEARING

Petitioner respectfully moves for rehearing on the per curiam opinion of this Court dated October 14, 1968, granting the Motion to Dismiss for want of a substantial federal question.

GROUNDS

1. The selective collection by the state of Petitioner's maintenance expense is clearly an invidious discrimination and constitutes a prima facie showing of a substantial federal question.

The traditional test under the Equal Protection Clause has been whether a state has made an invidious discrimination as when it selects a particular group, race, or class for oppressive treatment. *Baker* v. *Carr,* 369 U.S. 186, 7 L.Ed. 2d 663, 82 S.Ct. 691. See also *Skinner* v. *Oklahoma,* 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110.

2. A substantial amount in property rights is involved.

At the time of hearing before the Probate Court, the amount of the claim by the State of Colorado for Petitioner's maintenance was $7,704.49. The amount of this claim has continued to accumulate and is now in excess of $17,000.00. In the Motion of the State of Colorado filed before the Supreme Court of Colorado to advance the case on the docket because of the importance of the case, the Attorney General averred on page 2, paragraph 5,

> "That the judgment to which the Writ of Error is directed is therefore creating serious financial and administrative difficulty for Colorado State Hospital which heretofore has been collecting approximately One Hundred Thousand ($100,000.00) Dollars per year for the care and maintenance of the criminally insane and Three Million ($3,000.000.00) Dollars per year for the care and maintenance of the civilly adjudicated mentally ill, said funds being used to defray a portion of the cost of the operation of the Colorado State Hospital. There is no dispute that the problem is of a substantial financial proportions within the State of Colorado. [Transcript of Record]."

As pointed out in Petitioner's Brief Opposing Motion to Dismiss Appeal, many of the 42 states having legislation permitting the collection from estates of incompetent persons for maintenance do have statutory powers to so collect from the estates of those committed as criminally insane. Accordingly, the total amount collected by the states could easily amount to a figure in the millions of dollars and is thus of very substantial concern to those criminally committed and to the many states involved.

This Court has often granted review of a state Court holding bringing into question constitutionality of a statute similar to those in force in many of the states, *People of State of New York* v. *O'Neill,* 359 U.S. 1, 3 L.Ed. 2d 585, 79 S.Ct. 564.

The record abundantly demonstrates that the right to acquire, enjoy, and dispose of property is protected from discriminatory state action by the Fourteenth Amendment.

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of the Amendment as an essential pre-condition to the realization of other basic civil rights and liberty which the Amendment was intended to guarantee."

Shelley v. *Kraemer,* 334 U.S. 1, 92 L.Ed. 845, 68 S.Ct. 836.

3. The question presented by this appeal will continue to be a source of controversy and is of such substance that it warrants a review by this court.

The continued assessment under various state laws of hundreds and possibly thousands of persons committed as criminally insane to state institutions will continue to be a

source of wide-spread controversy and litigation. This Court has consistently granted review where the issue presented raises a question which is likely to be a continuing source of controversy and litigation in both the state and federal Courts. *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792. See also *U. S.* v. *Oregon*, 366 U.S. 643, 6 L.Ed. 2d 575, 81 S.Ct. 1278.

CONCLUSION

In view of the clear showing of an invidious discrimination in violation of Petitioner's rights to equal protection under the Fourteenth Amendment, and in view of the showing that substantial property rights are involved which can be the source of continuing controversy, Petitioner respectfully moves for rehearing.

CERTIFICATE

Counsel for the Petitioner hereby certify that this Petition is presented in good faith and not for the purpose of delay.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ESTATE OF BURNELL *v.* COLORADO.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 239. Decided October 14, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.